Bintulu Development Authority v Pilecon Engineering Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–277 OF 2002–I
CLEMENT SKINNER J
14 NOVEMBER 2003

Arbitration — Agreement — Incorporation of arbitration clause — Proper interpretation of arbitration clause — Whether a dispute or difference had arisen between the parties — Approach to be taken in resolving this issue

Arbitration — Arbitrator — Jurisdiction — Whether arbitrator has jurisdiction to determine issues of breach of contract — Whether jurisdiction determined by terms of arbitration clause

Equity — Estoppel — Arbitration — Conduct of one party — Whether party in view of its conduct in arbitration may be estopped from asserting lack of jurisdiction in arbitrator

This was the hearing of a special case that has been stated pursuant to s 22(1)(a) of the Arbitration Act 1956, requiring the decision of the High Court on several questions that have arisen in the course of an arbitration before Tan Sri Datuk Amar Chong Siew Fai. The case has been stated by the arbitrator at the request of the disputants, who are the Bintulu Development Authority ('the plaintiff/respondent') and Pilecon Engineering Bhd ('the defendant/claimant'). By an agreement in writing dated 10 December 1993 made between the plaintiff/respondent and the defendant/claimant the claimant agreed to build and complete the proposed Bintulu Development Authority Headquarters Building at Bintulu ('the Works'). Condition 43 of the said General Conditions of Contract contained provisions for the resolution of any dispute or difference that may arise between the respondent and claimant to be referred to arbitration. It is the plaintiff/respondent's case that no dispute or difference has arisen between the plaintiff and the defendant and therefore there is nothing for the arbitrator to arbitrate upon. The defendant/claimant's position was that there were disputes and differences between the parties which had been referred to the engineer for a decision under the Contract. The questions posed by the arbitrator were: 1) whether or not a dispute or difference had arisen between the plaintiff/respondent and the defendant/claimant; 2) if the answer to (1) above was in the affirmative was there a reference of the dispute or difference by the defendant/claimant to the engineer for a decision; and 3) if the answer to (2) above was in the negative can the arbitration be proceeded with and be continued further; 4) alternatively whether the arbitrator has been validly appointed by the parties pursuant to the Letter of Appointment dated 12 December 2001; and 5) whether the plaintiff/respondent in view of its conduct was now entitled to dispute the validity of the arbitration proceedings.

Held:

(1) The answer to the proper interpretation of Condition 43 of the said General Conditions of Contract would effectively decide questions

(1) and (2) while the answer to the jurisdiction point would effectively decide questions (4) and (5) which have been posed for the court's decision. Because of its nature the answer to question (3) would depend on which way the jurisdiction point is decided (see para 9)

(2) The issue of whether a dispute or difference had arisen between the parties was a question of pure construction. The approach to be taken in resolving this issue is well settled. It is that the starting point must be the arbitration clause itself, with its true purport being determined by reference to its own language. (*Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545) (see para 19).

(3) Given the plain and unambiguous words used in Condition 43(a), (b) and (c), for an arbitration to be had, three pre-conditions must be fulfilled, namely, (1) the occurrence of a dispute or difference between the claimant and respondent; (2) thereafter the reference of such dispute or difference to the engineer for a decision; and (3) following the reference to him the engineer fails to give a decision or gives a decision which the claimant is not satisfied with (see para 21).

(4) The claimant appeared to be confused about the role of the engineer in making a decision in an application for extension of time under Condition 29 of the General Conditions of Contract and in making a decision under Condition 43 after a dispute has arisen between 'the Authority and the Contractor' and the parties have referred the said dispute to him. Having failed to appreciate that the engineer performed different functions under Conditions 29 and 43 the claimant failed to realize that the decision made pursuant to Condition 29 cannot be considered or deemed the decision of the engineer envisaged by Condition 43 or made as agent of the respondent (see paras 24 and 28).

(5) The claimant being aggrieved by the Attached Condition to each extension of time granted by the engineer should have referred its grievance to the respondent in accordance with Condition 43 instead of to the engineer who it mistakenly took to be the respondent's agent. As the claimant had failed to put its dissatisfaction with the decision of the engineer made under Condition 29 (in inserting the Attached Condition) to the respondent for its concurrence or otherwise, no dispute or difference could have arisen between it and the respondent in the circumstances (see para 29).

(6) Since no dispute or difference had arisen between the claimant and respondent on the 'conditional' extension of time and claim for prolongation costs points, no reference of the dispute or difference had been made by the claimant to the engineer for a decision in accordance with Condition 43. Question (1) must therefore be answered in the negative. Consequent thereto, question (2) did not arise for consideration (see para 31).

(7) As for the jurisdiction point, the respondent executed the letter of appointment in which it expressly acknowledged and confirmed the existence of disputes and differences between it and the claimant and thereafter it appeared before the arbitrator, received directions and

had also requested for further and better particulars of the claimant's points of claim and requested time to file its points of defence. All the actings of the respondent were positive and affirmative in nature and when viewed as a whole show that throughout the whole period before and during the arbitration the respondent (as well as the claimant) had proceeded on the assumption that there were disputes and differences which had arisen between the claimant and respondent which had been referred to the engineer for a decision which now required to be arbitrated. It would be unconscionable and unjust to now allow the respondent to resile from that position and assert lack of jurisdiction on the part of the arbitrator (see para 39).

[**Bahasa Malaysia summary**

Ini adalah pendengaran kes khas yang telah disebutkan mengikut s 22(1)(a) Akta Timbangtara 1956, yang memerlukan keputusan Mahkamah Tinggi di atas beberapa persoalan yang telah dibangkitkan semasa satu timbangtara di hadapan Tan Sri Datuk Amar Chong Siew Fai. Kes ini telah disebutkan oleh penimbangtara pada permintaan parti-parti yang mempunyai pertikaian, iaitu Bintulu Development Authority ('plaintif/responden') dan Pilecon ('defendan/penuntut'). Melalui satu perjanjian bertulis bertarikh 10 Disember 1993 di antara plaintif/responden dan defendan/penuntut, penuntut bersetuju membina dan menghabiskan Bangunan Ibu Pejabat Bintulu Development Authority di Bintulu ('Kerja-kerja itu'). Syarat 43 Syarat-Syarat Am Perjanjian mengandungi peruntukan-peruntukan untuk penyelesaian sebarang pertikaian atau perbezaan yang mungkin berbangkit di antara responden dan penuntut untuk dirujuk kepada timbangtara. Ia adalah kes plaintif/responden bahawa tiada pertikaian atau perbezaan di antara plaintif dan defendan dan oleh itu tiada apa-apa untuk penimbangtara menimbangtarakan. Defendan/penuntut menyatakan bahawa terdapat pertikaian dan perbezaan di antara parti-parti yang telah dirujuk kepada jurutera untuk satu keputusan di bawah Perjanjian itu. Soalan-soalan yang dikemukakan oleh penimbangtara adalah: 1) sama ada satu pertikaian atau perbezaan telah berbangkit di antara plaintif/responden dan defendan/penuntut; 2) jikalau jawapan kepada (1) adalah mengiakan sama ada terdapat rujukan pertikaian atau perbezaan oleh defendan/penuntut kepada jurutera untuk satu keputusan; dan 3) jikalau jawapan kepada (2) di atas adalah negatif bolehkah timbangtara itu diteruskan dan bersambung; 4) secara alternatif sama ada penimbangtara telah dilantik secara sah oleh parti-parti mengikut Surat Perlantikan bertarikh 12 Disember 2001; dan 5) sama ada plaintif/responden memandangkan perlakuannya berhak mempertikaikan kesahan prosiding timbangtara itu.

Diputuskan:

(1) Jawapan kepada tafsiran betul Syarat 43 Syarat-Syarat Perjanjian akan menjawab soalan-soalan (1) dan (2) sementara jawapan soalan bidang kuasa akan menjawab soalan-soalan (4) dan (5) yang telah ditanya untuk keputusan mahkamah. Oleh kerana sifatnya, jawapan kepada soalan (3) akan bergantung kepada jawapan kepada soalan bidang kuasa (lihat perenggan 9).

(2) Isu sama ada satu pertikaian atau perbezaan telah berbangkit di antara parti-parti adalah soalan tafsiran. Pendekatan yang diambil untuk menyelesaikan ini telah ditetapkan. Ia adalah bahawa tempat permulaan mestilah klausa timbangtara itu, dengan tujuan sebenarnya ditentukan dengan merujuk kepada bahasanya (*Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545) (lihat perenggan 19).

(3) Memandangkan kata-kata yang jelas yang digunakan di dalam Syarat 43(a), (b) dan (c), untuk mengadakah satu timbangtara, tiga pra syarat mesti dipuaskan, iaitu, (1) terdapat satu pertikaian atau perbezaan di antara penuntut dan responden; (2) selepas itu rujukan pertikaian atau perbezaan kepada jurutera untuk satu keputusan; dan (3) selepas rujukan kepada jurutera itu, jurutera itu gagal memberi keputusan atau memberi keputusan yang penuntut tidak puas (lihat perenggan 21).

(4) Penuntut seakan-akan keliru dengan tugas jurutera di dalam membuat keputusan di bawah Syarat 43 selepas satu pertikaian telah berbangkit di antara 'the Authority and the Contractor' dan parti-parti telah merujuk pertikaian itu kepada beliau. Oleh kerana penuntut gagal memahami bahawa jurutera itu melaksanakan tugas-tugas lain di bawah Syarat-Syarat 29 dan 43, penuntut gagal sedar bahawa keputusan yang dibuat mengikut Syarat 29 tidak dapat dianggap sebagai keputusan jurutera yang dibayangkan oleh Syarat 43 atau dibuat sebagai agen responden (lihat perenggan-perenggan 24 dan 28).

(5) Penuntut yang telah terkilan oleh syarat yang dilampirkan kepada setiap perlanjutan masa yang diberi oleh jurutera itu sepatut merujuk kilanan beliau kepada responden mengikut Syarat 43 dan bukan kepada jurutera itu yang telah disalah anggapnya sebagai agen responden. Memandangkan bahawa responden gagal meletakkan ketidakpuasan beliau dengan keputusan jurutera yang dibuat di bawah Syarat 29 (didalam memasukkan syarat yang disertakan) kepada responden untuk persetujuannya atau sebaliknya, tiada pertikaian atau perbezaan dapat dibangkitkan di antaranya dan responden di dalam keadaan itu (lihat perenggan 29).

(6) Memandangkan bahawa tiada pertikaian atau perbezaan telah dibangkitkan di antara penuntut dan responden pada perlanjutan masa 'conditional' dan tuntutan butiran-butiran kos perlanjutan, tiada rujukan yang telah dibuat oleh penuntut kepada jurutera untuk keputusan mengikut Syarat 43. Soalan (1) mesti dijawab secara negatif. Oleh itu, soalan (2) tidak perlu dipertimbangkan (lihat perenggan 31).

(7) Mengenai butiran bidang kuasa, responden melaksanakan surat perlantikan di mana beliau telah mengakui dan mengesahkan terdapatnya pertikaian dan perbezaan di antaranya dan penuntut dan selepas itu beliau menghadapi penimbangtara, menerima arahan dan juga telah memohon butir lanjut dan jelas butiran penuntut dan telah memohon masa untuk memfailkan butiran pembelaan. Semua tindakan responden adalah positif dan mengiakan dan jika dilihat sepenuhnya menunjukkan bahawa untuk seluruh tempoh sebelum dan semasa timbangtara itu responden (dan penuntut) telah terus pada anggapan bahawa terdapat

pertikaian dan perbezaan yang berbangkit di antara penuntut dan responden yang telah dirujuk kepada jurutera untuk keputusan yang sekarang perlu ditimbangtarakan. Ia tidak berpatutan dan tidak adil untuk membenarkan responden mengubah daripada keadaan itu dan mengatakan bahawa penimbangtara tidak mempunyai bidang kuasa (lihat perenggan 39).]

Notes

For cases on incorporation of arbitration clauses, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1070.

For cases on jurisdiction of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1113–1119.

For cases on estoppel in arbitration, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2446.

For arbitration clauses, see 13 *Halsbury's Laws of Malaysia*, para [220.009].

For source of arbitrator's jurisdiction, see 13 *Halsbury's Laws of Malaysia*, para [220.077].

Cases referred to

Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577 (refd)
Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545 (refd)
Davis v Price (1865) 34 LJQB 9 (refd)
Fastrack Contractors Ltd v Morrison & Anor (2000) BLR 168 (refd)
Greer v Kettle [1938] AC 156 (refd)
Monmouthshire CC v Costelloe & Kemple Ltd (1965) 5 BLR 83 (refd)
State Government of Sarawak v Chin Hwa Engineering Development Co [1995] 3 MLJ 237 (refd)
Waverly Jute Mills Co Ltd v Raymon & Co 1963 AIR SC 90 (refd)

Legislation referred to

Arbitration Act 1956 s 22(1)(a)

Lee Chuan Eng (Ee & Lim) for the plaintiff/respondent.
Anthony Ngeh (Cheng & Associates) for the defendant/claimant.

Clement Skinner J:

[1] This is the hearing of a special case that has been stated pursuant to s 22(1)(a) of the Arbitration Act 1956, requiring the decision of the High Court on several questions that have arisen in the course of an arbitration before Tan Sri Datuk Amar Chong Siew Fai. The case has been stated by the arbitrator at the request of the disputants, who are the Bintulu Development Authority ('the plaintiff/respondent') and Pilecon Engineering Bhd ('the defendant/claimant').

[2] Before I state the questions that have been posed for the court's decision, I will first state the facts giving rise to the arbitration and subsequently to this special case being stated.

[3] By an agreement in writing dated 10 December 1993 made between the plaintiff/respondent and the defendant/claimant the claimant, in consideration of the sum of RM52,498,691.03 or such other sums as shall become payable under the conditions of the said agreement, agreed to build and complete the proposed Bintulu Development Authority Headquarters Building at Bintulu ('the Works') and make good any defects whatsoever to the Works in conformity in all respects with the provisions of the General Conditions of Contract of the said agreement.

[4] Condition 43 of the said General Conditions of Contract contains provisions for the resolution of any dispute or difference that may arise between the respondent and claimant to be referred to arbitration. I will examine Condition 43 in more detail after I set out the following facts which have been agreed to by the parties.

(1) During the course of the Works, the claimant made applications for extensions of time to complete the Works on different occasions and dates between October 1994 and November 1997.

(2) Upon such applications the claimant was granted eight extensions of time. In each of the certificates extending time was attached the condition (by the engineer) that:

> This certificate is issued on the condition that no claim will be entertained for any item of preliminaries and that under no circumstances will any claims be considered for any extra costs incurred due to the delay in the completion of works to be executed under this Contract.

I shall refer to this condition as 'the Attached Condition'.

(3) Certificate of Practical Completion of the Works was issued on or about 10 September 1997.

(4) By a letter dated 17 July 2001 the claimant wrote to Hijjas Kasturi Associates Sdn Bhd the engineer in the General Conditions of Contract with a copy extended to the respondent. I will set out the material parts of this letter to bring the issues between the parties into focus. It reads:

> During the course of the execution of the Works, you issued eight certificates of extension of time granting full extension of time of a total 639 days from the original completion date under the Contract. You have stated in the eight certificates of extension of time:
>
> > '5 This certificate is issued on the condition that no claim will be entertained for any item of preliminaries and that under no circumstances will any claim be considered for any extra costs incurred due to the delay in completion of works to be executed under this contract.'
>
> Please note that there is no provision under cl 29 of the General Conditions of Contract empowering you to stipulate item 5 in the eight certificates of extension of time. Furthermore, we ourselves have not agreed to the stipulation by you of any such item.
>
> As a result of our overstaying on the site for 639 days, we have incurred loss and expense. We have estimated our loss and expense, including head office and on

site costs, interest and financial charges, plant and equipment charges, and loss of productivity, in the region of RM13,300,000. We have excluded in our computation of damage those periods of overstaying owing to natural events. We hereby, therefore, claim from you damages in the sum of RM13,300,000.

Please kindly let us hear favourably from you as soon as possible.

As I mentioned a moment ago, this letter was copied to the respondent.

(5) Not having received any reply from the engineer the claimant then by its letter of 25 September 2001 wrote to the respondent alleging that 'adispute or difference has arisen between us and yourselves under and/or on the construction of the Contract on the following matters:

(i) the question of whether the engineer could impose the following in the eight certificates of extension of time: (the Attached Condition is set out); and

(ii) Our claim for damages for overstaying on the site for 639 days in the sum of RM13,300,000.

The claimant then required that the dispute or difference be referred to arbitration and final decision of the arbitrator pursuant to Condition 43(c) of the General Conditions of Contract.

(6) By Letter of Appointment dated 12 December 2001 the parties' agreed to appoint Tan Sri Datuk Amar Chong Siew Fai as the sole arbitrator. In view of the importance attached to this Letter of Appointment by the Claimant, I consider it appropriate to pause here to set out its contents. It reads:

LETTER OF APPOINTMENT

THIS LETTER OF APPOINTMENT is JOINTLY MADE this 12th day of December 2001, by PILECON ENGINEERING BHD (29223-P), the Claimant herein, and BINTULU DEVELOPMENT AUTHORITY, the Respondent herein.

WHEREAS Clause 43 of the General Conditions of Contract in Contract No BDA/CT/06/93 between the parties hereto dated the 10th day of December 1993, provides, 'inter alia', that disputes and/or differences between the parties as to '(i) the construction of this Contract, or (ii) any matter or thing of whatsoever nature arising under this Contract, or (iii) the withholding by the Engineer of any certificate to which the Contractor may claim to be entitled … be referred to the arbitration and final decision of a person to be agreed between the parties to act as the Arbitrator.

AND WHEREAS there are such disputes and/or differences between the parties hereto.

AND WHEREAS the claimant has, on the 25th day of September 2001, served on the Respondent Notice of Arbitration (Arbitration-BDA/CT/06/93/2001/I) bearing 'idem' date.

AND WHEREAS the parties hereto have agreed to appoint TAN SRI DATUK AMAR CHONG SIEW FAI as the sole Arbitrator.

NOW PURSUANT to Clause 43(c) of the General Conditions of Contract in Contract No BDA/CT/06/93, THE PARTIES HERETO DO HEREBY JOINTLY

APPOINT TAN SRI DATUK AMAR CHONG SIEW FAI as the sole Arbitrator for the purposes of Clause 43 of the General Conditions of Contract.

The fees and terms of the appointment of TAN SRI DATUK AMAR CHONG SIEW FAI shall be fixed at the Preliminary Meeting to be convened by the Arbitrator as soon as practicable.

SIGNED by) TEO KAH FATT
PILECON ENGINEERING BHD (29223-P),)
the Claimant, through its authorized representative) SGD

SIGNED by) HJ SU'UD HJ SUHAILI
BINTULU DEVELOPMENT AUTHORITY)
the Respondent, through its authorized representative) SGD
Pengurus Besar
Lembaga Kemajuan
Bintulu

(7) The parties attended a preliminary meeting before the arbitrator on 29 January 2002 to obtain directions for the conduct of the arbitration, which directions were given by the arbitrator on the same date.

(8) The claimant served its points of claim dated 6 February 2002 on the respondent.

(9) The respondent thereafter on 7 March 2002 requested for further and better particulars of the points of claim, which particulars were duly served on the respondent on 19 March 2002.

(10) By a letter dated 17 April 2002, Messrs Ee & Lim on behalf of the respondent wrote to the claimant to ask for an extension of time to file the respondent's defence.

(11) By a letter dated 26 April 2002 Messrs Ee & Lim on behalf of the respondent wrote to the arbitrator stating that in their opinion there was no dispute or difference between the respondent and the claimant to be arbitrated.

(12) The claimant's representative responded to this letter by his letter of 3May 2002.

(13) The respondent replied to the claimant by Messrs Ee & Lim's letter of 9 May 2002.

(14) Following the exchange of letters a meeting was convened by the arbitrator on 28 May 2002 wherein the respondent requested for a case to be stated to the High Court relating to the construction of Condition 43 for its determination. The arbitrator then directed each party to submit its submissions on the matter.

(15) Pursuant thereto the submissions were duly submitted to the arbitrator and on 4 July 2002, upon the respondent's request, the arbitrator agreed to state a case for the decision of the High Court.

[5] For completeness, I should mention that the reasons for the arbitrator doing so were first, he found that the questions raised by the respondent about the validity of the reference had a direct bearing on his jurisdiction as an arbitrator, in that, a valid reference was a condition precedent to his being appointed as the arbitrator; secondly, his interpretation of Condition 43 did not empower him, as arbitrator, to rule on his own jurisdiction; and thirdly, considerable time and costs would have been wasted if the arbitration proceedings were to proceed without the issue in dispute being decided by the High Court and subsequently found to be invalid.

[6] This will be an appropriate place to pause again to set out the provisions of Condition 43(a), (b) and (c) of the General Conditions of Contract (*in extenso*):

> Arbitration
>
> 43(a) If any dispute or difference shall arise between the Authority and the Contractor, either during the progress or after completion of the Works, or after the determination of the contractor's employment, or breach of this Contract, as to:
>
> (i) the construction of this Contract, or
>
> (ii) any matter or thing of whatsoever nature arising under this Contract, or
>
> (iii) the withholding by the Engineer of any certificate to which the Contractor may claim to be entitled, then such dispute or difference shall be referred to the Engineer for a decision.
>
> (b) The Engineer's decision which is to be in writing shall subject to sub-clause (e) hereof be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.
>
> (c) If the Engineer fails to give a decision for a period of forty five (45) days after being requested to do so by the Contractor or if the Contractor is dissatisfied with any decision of the Engineer, then in any such case the Contractor may within forty five (45) days after the expiration of forty five (45) days after he had made his request to the Engineer, or forty five (45) days after receiving the decision of the Engineer, as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between parties to act as the Arbitrator.

[7] I will now state the questions that have been posed by the arbitrator for the decision of the court. They are:

(1) whether or not a dispute or difference had arisen between the plaintiff/respondent and the defendant/claimant;

(2) if the answer to (1) above is in the affirmative was there a reference of the dispute or difference by the defendant/claimant to the engineer for a decision; and

(3) if the answer to (2) above is in the negative can the arbitration be proceeded with and continued further;

(4) alternatively whether the arbitrator has been validly appointed by the parties pursuant to the Letter of Appointment dated 12 December 2001; and

(5) in the further alternative whether the plaintiff/respondent in view of its conduct as stated in the statement of agreed facts is now entitled to dispute the validity of the arbitration proceedings.

[8] In my judgment the answer to the questions posed will turn on the resolution of two issues that have arisen in this case stated. They are:

(1) whether upon a proper interpretation of Condition 43 of the General Conditions of Contract a dispute or difference had arisen between the parties which dispute or difference had been referred to the engineer for a decision ('the construction point'); and

(2) if there was no such dispute, difference or decision, then, whether the respondent, in view of its conduct, before and in the arbitration, is precluded from asserting lack of jurisdiction in the arbitrator to decide on the matters before him and to dispute the validity of the arbitration proceedings ('the jurisdiction point').

[9] It is also apparent to me that the answer to the construction point will effectively decide questions (1) and (2) while the answer to the jurisdiction point will effectively decide questions (4) and (5) which have been posed for the court's decision. Because of its nature the answer to question (3) will depend on which way the jurisdiction point is decided.

[10] I will now consider each of the issues.

The construction point

[11] It is the plaintiff's case that no dispute or difference has arisen between the plaintiff and the defendant and therefore there is nothing for the arbitrator to arbitrate upon. The plaintiff maintains this position because upon its construction of Condition 43 of the General Conditions of Contract the following position emerges:

(a) before any matter can be referred to the engineer for a decision under Condition 43(a), there must first be a dispute or difference which has arisen between the respondent and the claimant;

(b) for a dispute to arise between the respondent and the claimant the claimant must first put to the respondent any matter or issue it requires to be resolved and only after the respondent has disagreed with the claimant on that matter or issue can a dispute or difference be said to have arisen between them;

(c) then and only thereafter can the dispute which has arisen between the respondent and the claimant be referred to the engineer for a decision;

(d) after the dispute has been referred to the engineer and if the engineer thereafter either (i) fails to give a decision for a period of 45 days after

being requested to do so by the claimant or (ii) if the claimant be dissatisfied with the decision of the Engineer then in any such case the claimant may within 45 days after the expiration of 45 days of making its request to the engineer or 45 days after receiving the decision of the Engineer require that such dispute or difference be referred to arbitration under Condition 43(c).

[12] The respondent contends that no dispute or difference has arisen between it and the claimant regarding the claimant's unhappiness with the Attached Condition in the eight Certificates of Extension issued by the Engineer because the claimant never referred the matter to the respondent for its concurrence or otherwise. According to the respondent, when the claimant wrote to the engineer on 17 July 2001 it did two things: first, it pointed out to the engineer that there was nothing stated in Condition 29 of the General Conditions of Contract to empower the engineer to impose the Attached Condition in granting an extension of time; and secondly, it was making a claim for damages from the engineer. The respondent says that the claimant's letter of 17 July 2001 was not a letter requesting the engineer to make a decision on any dispute or difference between the claimant and the respondent and therefore when the claimant did not receive any reply from the engineer, it was wrong for the claimant to have assumed when it wrote to the respondent on 25 September 2001, that a dispute or difference had arisen between them under the Contract and for the matter to be referred to arbitration.

[13] Accordingly, it is the respondent's position that there being no dispute or difference between it and the claimant or even assuming for the sake of argument that there was a dispute or difference, there was no request made by the claimant to the engineer for a decision, which is the underlying basis necessary to activate the arbitration mechanism under Condition 43 and to found the jurisdiction for the arbitrator to proceed or continue with the proceedings.

[14] As against this, the claimant's position is that there were disputes and differences between the parties which had been referred to the engineer for a decision under the Contract. According to the claimant, there is no definition of what constitutes a 'dispute' or 'difference' in the General Conditions of Contract, but from the decision in such cases like *Monmouthshire CC v Costelloe & Kemple Ltd* (1965) 5 BLR 83 and *Fastrack Contractors Ltd v Morrison & Anor* (2000) BLR 168, it is safe to say that before a dispute or difference can exist, there must firstly be a claim by one party, and a decision on the claim by the opposing party. In this regard, the claimant says that the disputes and differences between the parties which had been referred to the engineer for a decision comprised two components namely (a) the validity of the 'conditional' extension of time and (b) the claim for prolongation costs.

[15] With regard to the 'conditional' extension of time point, it is the claimant's contention that: (i) when granting extension of time the engineer would have made a decision on its applications for extension of time. Such applications amount to claims by the claimant and the award of extensions

of time would amount to a decision on these claims; (ii) therefore the issue of whether the extension could be made conditional had been rightly referred to the engineer for a decision by the claimant's letter of 17 July 2001 and thereafter to arbitration by its letter of 25 September 2001; and (iii) the engineer was the respondent's agent at all material times and Condition 29 only provides for applications for extension of time to be made to the engineer and not the respondent directly and hence the respondent cannot now say that because there was no claim for extension of time made by the claimant to it there was no dispute between the parties.

[16] With regard to its claim for prolongation costs, the claimant contended that: (i) the engineer had on behalf of the respondent asserted a claim that the claimant could not make a claim for prolongation costs and that mere silence on its part does not mean the assertion is not disputed; and (ii) the claimant by choosing not to formally respond to the engineer is taken to have denied the engineer's claim.

[17] As a second line of argument, the claimant contends that the respondent is now estopped from denying the existence of a dispute or difference between the parties because of the conduct or actings of the respondent before and in the arbitration. The conduct which the claimant refers to as giving rise to estoppel are:

(1) Upon receipt of the claimant's notice of arbitration ie its letter of 25September 2001, the respondent took steps jointly with the claimant in the appointment of the arbitrator by the respondent first nominating Tan Sri Datuk Amar Haji Mohd Jemuri Serjan as the arbitrator but upon his declining to accept appointment, by agreeing to the appointment of Tan Sri Datuk Amar Chong as the arbitrator.

(2) In the letter of appointment of the arbitrator, the respondent had in the recitals admitted that there are disputes and differences between the parties to be arbitrated. In this regard the claimant submitted that the recitals constitute a statement of all parties inserted jointly by the respondent and the claimant which it is not open to the respondent to resile from at this stage of the proceedings and to question the appointment and jurisdiction of the Arbitrator. In support the claimant referred to *The Interpretation of Contracts* by Kim Lewison, London Street & Maxwell [1989] at p 225 where this passage appears:

> 9.15 Recital as estoppel
>
> Where a recital is intended to be a statement of all parties, all parties are estopped from denying the truth of the recital. But where the recital is the statement of one party only, only one party is so estopped.
>
> In *Greer v Kettle* [1938] AC 156 Lord Maugham said:
>
> 'Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as building between the parties and privies and therefore as not admitting any contradictory proof.'

(3) If there were any pre-requisites in Condition 43 which the claimant had not fulfilled, the respondent has by its conduct waived such pre-requisites when it actively participated in the appointment of the arbitrator, and signed the letter of appointment which constituted an 'ad hoc' agreement between the parties to refer the disputes that had arisen between them to arbitration.

(4) Subsequent to the appointment of the arbitrator, the respondent attended the preliminary meeting, received directions, requested for further and better particulars on the claims in the points of claim, which were duly supplied. Thereafter the respondent requested for time to file points of defence and was given it but has not filed the same in view of this application.

[18] In my view, although the claimant has raised this line of argument while arguing the construction point, it overlaps with and really relates to the jurisdiction point and so I shall deal with it when I consider that issue.

[19] In my judgment the issue of whether a dispute or difference had arisen between the parties is a question of pure construction. The approach I should take and the principles I should apply in resolving this issue are well settled. It is that the starting point must be the arbitration clause itself, with its true purport being determined by reference to its own language. Authority for this proposition is the case of *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 where his Lordship Gopal Sri Ram JCA said at p 555:

> The issue, therefore, as correctly identified by the learned judge, is whether the arbitration clause is confined to disputes arising under the first work order or whether it extends to the eight work orders. That, as I have already said, is a question of pure construction. The approach to be and the principles by which the issue falls to be resolved are well settled and beyond argument.
>
> The starting point must be the arbitration clause itself. Counsel on both sides of the Bar have referred us to several cases on the question of interpretation. While I have found the authorities interesting, I must confess that I have derived little assistance from them.
>
> In my judgment, the true ambit of the arbitration clause in the present instance falls to be determined by reference to its own language. Although decided cases do assist in providing general guidelines, they are, save in very exceptional cases, merely decisions upon their own facts and are not to be taken as establishing the meaning that is to be assigned to the words used by parties to express themselves in a given case.

[20] Dicta to the same effect is to be found in *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 where May LJ of the English Court of Appeal said (at p 581):

> In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean.

[21] and at p 582:

> Similarly it is a principle of law that the scope of an arbitrator's jurisdiction and power in a given case depend fundamentally on the terms of the arbitration agreement, that is to say upon its proper construction in all the circumstances.

However, I do not think there is any principle of law to the effect that the meaning of certain specific words in one arbitration clause in one contract is immutable and that those same words in another arbitration clause in other circumstances in another contract must be construed in the same way. This is not to say that the earlier decision on a given form of words will not be persuasive, to a degree dependent on the extent of the similarity between the contracts and the surrounding circumstances in the two cases. In the interests of certainty and clarity a court may well think it right to construe words in an arbitration agreement, or indeed in a particular type of contract, in the same way as those same words have earlier been construed in another case involving an arbitration clause by another court. But in my opinion the subsequent court is not bound by the doctrine of stare decisis to do so.

[22] I have already set out the provisions of Condition 43(a), (b) and (c) in an earlier part of this judgment. I find no difficulty in ascertaining what the true intentions of the parties were by giving to the plain and unambiguous words used in Condition 43(a) and (c) their natural and proper meaning. When that is done it will be seen that it was intended by the parties that for an arbitration to be had, three pre-conditions must be fulfilled, namely, (1)the occurrence of a dispute or difference between the claimant and respondent. There can be no more vivid expression of this intention than the first part of Condition 43(a) where it says 'If any dispute or difference shall arise between the Authority (Respondent) and the Contractor (Claimant) …'; (2) thereafter the reference of such dispute or difference to the engineer for a decision. The words that express this intention are found in the second part of Condition 43(a) where it says 'then such dispute or difference shall be referred to the Engineer for a decision'; and (3) following the reference to him the engineer fails to give a decision or gives a decision which the claimant is not satisfied with.

[23] The next question is whether the three pre-conditions have been fulfilled by the claimant?

[24] The claimant says it has done so. At the expense of some repetition, it will be recalled that the claimant contends that a dispute has arisen between it and the respondent on its challenge to the validity of the 'conditional' extension of time because it says that each of its applications for extension of time which could only be made to the engineer (and not to the respondent) under Condition 29 amounted to an assertion of a claim and the award of extensions of time would amount to a decision on those claims. Therefore, when it wrote to the engineer on 17 July 2001 questioning the authority of the engineer to impose the Attached Condition and the engineer did not give a reply to the claimant, a dispute had arisen between the claimant and the respondent because the engineer was the respondent's agent at all material times. Likewise, it will be recalled that in respect of its claim for prolongation costs, the claimant has said that in imposing the Attached Condition to each certificate of extension of time, the engineer had on behalf of the respondent asserted a claim that the claimant would not make a claim for prolongation costs. The claimant says that as it had chosen not to formally respond to the engineer it must be taken to have denied the engineer's claim and since the engineer was acting on behalf of the respondent, a dispute has arisen between the claimant and the respondent on this point as well.

[25] I regret I cannot agree with the arguments advanced by the claimant on both the points because they rely on a flawed assumption for their correctness, namely, the mistaken assumption by the claimant that for the purpose of Condition 43 the engineer is the respondent's representative or agent. I agree with the respondent that the fallacy in the claimant's argument on the 'conditional' extension of time point is that the claimant is equating the decision made by the engineer under Condition 29 with the decision contemplated by the parties to be made by the engineer after a dispute has arisen between them under Condition 43. I agree with the respondent that the claimant appears to be confused about the role of the engineer in making a decision in an application for extension of time under Condition 29 of the General Conditions of Contract and in making a decision under Condition 43 after a dispute has arisen between 'the Authority and the Contractor' and the parties have referred the said dispute to him.

[26] The claimant has failed to appreciate that in the course of managing the contract the engineer is wearing two different hats, one for the purpose of Condition 29 and the other for Condition 43, in that:

(i) under Condition 29 he is called upon to make a decision in the course of managing the contract works on whether or not an extension of time should be granted in the circumstances and if so the length of extension. He is here acting as certifier and not as agent of the respondent;

(ii) under Condition 43 the engineer is called upon to make a decision after a dispute has already arisen between the 'Authority and the Contractor'. Here he is called upon to adjudicate on the dispute. He is here in the position of a decider and has to decide fairly between the parties and not as the agent of the respondent.

[27] In this regard useful reference may be made to the following passage which appears in Vol 4(2) *Halsbury's Laws of England* (4th Ed) at para 532:

> In most building contracts the architect has to perform a number of duties as a certifier as well as acting on behalf of an employer. His duties as certifier are different from his duties as agent or arbitrator although sometimes it is not easy to distinguish them. In general an architect is only an arbitrator when he has to determine a dispute or differences that has arisen between the employer and the contractor. … The architect is also acting as a certifier when he has to … grant extension of time … .

[28] Although the above passage refers to the role of an architect, it is my view that it accurately describes the duties performed by the engineer in this case under Conditions 29 and 43 of the Contract

[29] Having failed to appreciate that the engineer performed different functions under Conditions 29 and 43 the claimant has failed to realize that the decision made pursuant to Condition 29 cannot be considered or deemed the decision of the engineer envisaged by Condition 43 or made as agent of the respondent.

[30] The claimant being aggrieved by the Attached Condition to each extension of time granted by the engineer should have referred its grievance

to the respondent in accordance with Condition 43 instead of to the engineer who it mistakenly took to be the respondent's agent. As the claimant had failed to put its dissatisfaction with the decision of the engineer made under Condition 29 (in inserting the Attached Condition) to the respondent for its concurrence or otherwise, no dispute or difference could have arisen between it and the respondent in the circumstances.

[31] With regard to the submissions made by the claimant in support of its contention that a dispute or difference has arisen between it and the respondent on its claim for prolongation costs, everything I have said when discussing the claimant's 'conditional' extension of time point will apply with equal force here. This is so because the engineer's decision on the prolongation costs was again made for the purpose of Condition 29 as a certifier and not as agent of the respondent. It is clear to me that the claimant, being dissatisfied with the decision of the engineer regarding its prolongation costs should have put its dissatisfaction to the respondent for its concurrence or otherwise in accordance with Condition 43 instead of to the engineer who it mistakenly took to be the respondent's agent. In the circumstances no dispute or difference had arisen between it and the respondent on its claim for prolongation costs.

[32] It must follow from what I have said that as no dispute or difference had arisen between the claimant and respondent on the 'conditional' extension of time and claim for prolongation costs points, no reference of the dispute or difference had been made by the claimant to the engineer for a decision in accordance with Condition 43. Question (1) must therefore be answered in the negative. Consequent thereto, question (2) does not arise for consideration.

[33] Since I have answered question (1) in the negative or rather in favour of the respondent, it has become necessary to consider the second issue ie the jurisdiction point.

The jurisdiction point

[34] I have earlier on in this judgment stated why the claimant says that the respondent should be precluded from questioning the jurisdiction of the arbitrator and the validity of the arbitration proceedings. In reply to the claimant's contentions, the respondent says that it should not be precluded from taking the course it has because:

(i) The recitals in the letter of appointment are merely introductory of the foundation for the appointment of the arbitrator and are not binding on the parties.

(ii) The letter of appointment was entered into by the parties on the common mistake that there was then in existence a dispute or difference between them which had been referred to the engineer for a decision, when in fact no dispute or difference has arisen. The letter of appointment being based on a mistake common to both parties, the appointment fails.

(iii) Being made pursuant to Condition 43, the letter of appointment cannot in any way be construed as an 'ad hoc' agreement, or capable of superseding Condition 43.

(iv) There is nothing in its conduct that would operate as an estoppel against it to question the arbitration proceedings because:

(a) pleadings in the arbitration had not closed yet when it took the jurisdiction point;

(b) the law allows it to question the jurisdiction of an arbitrator even after the award has been published and even at the stage of enforcement;

(c) it was merely participating in the proceedings before the arbitrator and such participation does not preclude it from challenging the jurisdiction of the arbitrator;

(d) the defect complained of is one affecting jurisdiction and goes to the root of the proceedings so that if its objections are upheld all the proceedings will be rendered null and void;

(e) neither consent nor waiver may confer jurisdiction where there is none;

(f) the common law doctrine of estoppel by deed is not an absolute one as it has been tempered by equity. In support the respondent relied on this passage in the judgment of Lord Maugham in *Greer v Kettle* [1938] AC 156 at p 171:

> The position in equity is and was always different in this respect, that where there are proper grounds for rectifying a deed, eg because it is based upon a common mistake of fact, then to the extent of the rectification there can plainly be no estoppel based on the original form of instrument. It is at least equally clear that in equity a party to a deed could not set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission or in reliance on an untrue statement or an untrue recital induced by his own representation, whether innocent or otherwise, to the other party.

[35] Relying on what is stated above, the respondent says that the appointment of the arbitrator was initiated by the claimant including the drafting of the letter of appointment based on its erroneous construction of Condition 43 and the respondent was merely 'drifting along' relying on the claimant's wrong interpretation, and induced by the untrue statements in the recital the respondent signed the letter of appointment. Accordingly, it is the respondent's case that estoppel by deed would not operate against it in this instance.

[36] Having stated the competing contentions advanced by the parties on the jurisdiction point, it is appropriate that I should now refer to the principles of law that govern the issue at hand. This has been conveniently stated in *Bauer (M) Sdn Bhd v Daewoo Corp*.

[37] That was a case in which both the High Court and the Court of Appeal had arrived at a finding that, on a true construction of the documents, the arbitrator lacked jurisdiction over eight works orders that formed the subject matter of the appellant's claim in the arbitration proceedings. But the question which arose acutely for decision before the Court of Appeal was whether a party (the respondent there) may by its conduct be precluded from asserting

lack of jurisdiction. To resolve that question his Lordship Gopal Sri Ram JCA referred to what was said in three cases, namely, *Davis v Price* (1865) 34 LJQB 9; *Waverly Jute Mills Co Ltd v Raymon & Co* 1963 AIR SC 90; and *State Government of Sarawak v Chin Hwa Engineering Development Co* [1995] 3 MLJ 237, and then stated the law relating to an arbitrator's jurisdiction in the following terms (at p 561):

> To begin with, it is important to recognize that the foundation of an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an agreement, there is no jurisdiction. And as a general rule mere participation in proceedings before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction.

[38] I should also point out that the decision in the *Bauer* case is important in at least two other aspects — it once again demonstrates the utility of the flexible doctrine of estoppel and its application to different fact patterns and situations to achieve justice, and, the readiness of the court there to apply the doctrine in a situation where objections based on a lack of jurisdiction had been raised in the context of a private and consensual adjudication of disputes.

[39] Returning to the issue at hand, the question that must be asked is this: can it be said that the respondent had appeared without protest and was merely participating or 'drifting along' in proceedings before the arbitrator and so is not precluded from asserting lack of jurisdiction in the arbitrator?

[40] In my judgment that question must be answered in the negative. Here, it was the respondent who had initially nominated Tan Sri Datuk Amar Haji Jemuri Serjan as arbitrator but when he declined appointment agreed to the appointment of Tan Sri Datuk Amar Chong Siew Fai as arbitrator. Then the respondent executed the letter of appointment in which it expressly acknowledged and confirmed the existence of disputes and differences between it and the claimant and thereafter it appeared before the arbitrator, received directions and had also requested for further and better particulars of the claimant's points of claim and requested time to file its points of defence. All the actings of the respondent which I have just referred to were positive and affirmative in nature and when viewed as a whole show that throughout the whole period before and during the arbitration the respondent (as well as the claimant) had proceeded on the assumption that there were disputes and differences which had arisen between the claimant and respondent which had been referred to the engineer for a decision which now required to be arbitrated. It would be unconscionable and unjust to now allow the respondent to resile from that position and assert lack of jurisdiction on the part of the arbitrator.

[41] This is also not a case where the respondent has chosen to lay still and only defend itself at the stage of enforcement of an award (as alluded to in *State Government of Sarawak v Chin Hwa Engineering Development Co*) — here it has actively participated in each of the stages necessary in getting the

arbitration on footing and thereafter in the arbitration going forward and its actings in so doing can only be viewed as indicating that even if the claimant had not taken the correct or necessary steps to activate the arbitration mechanism housed in Condition 43, it was nevertheless prepared to proceed as if the arbitration mechanism had been properly activated, ie that the three pre-conditions in Condition 43 had been fulfilled. In the circumstances of this case any reasonable man in the shoes of the claimant would have been entitled to assume that the respondent would not mount a challenge to the arbitrator's jurisdiction on that ground.

[42] The respondent has argued that it executed the letter of appointment under a common mistake of fact and so estoppel by deed will not operate against it. I regret I am unable to accept this argument. In the first place, the claimant does not rely only on the letter of appointment as giving rise to estoppel; it also relies on all the other actings of the respondent earlier described. In the second place, it is my view that despite the claimant's plea of mistake, the wide and flexible doctrine of estoppel would operate to prevent the claimant from setting up mistake as an excuse in law as it would be unjust to allow the claimant to do so. In support of what I say I refer to what Lord Denning said in *Amalgamated Investment and Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at p 112:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estopped by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.* (Emphasis added.)

[43] For all the reasons I have given, having regard to the conduct and actings of the respondent which I have earlier described, the respondent cannot now be heard to say that the arbitrator lacked jurisdiction. It would be unjust to allow it to do so.

[44] I would accordingly answer question (4) with a 'Yes' and question (5) with a 'No'.

[45] I will conclude by stating my answers to the questions posed:

(1) Q: Whether or not a dispute or difference had arisen between the plaintiff and the defendant? A: 'No'.

(2) Q: If the answer to (1) above is in the affirmative was there a reference of the dispute or difference by the defendant to the engineer for a decision?

A: As the answer to (1) above is 'No', this question does not arise for consideration.

(3) Q: If the answer to (2) above is in the negative can the arbitration be proceeded with and continued further? A: Notwithstanding that question (2) was not answered, the answer is 'Yes' in view of the answer to questions (4) and (5).

(4) Q: Alternatively whether the arbitrator has been validly appointed by the parties pursuant to the letter of appointment dated 12 December 2001? A: 'Yes'.

(5) Q: In the further alternative whether the respondent in view of their conduct as stated in the statement of agreed facts is now entitled to dispute the validity of the arbitration proceedings? A: 'No'.

[46] I also order that the costs of this application be paid by the respondent to the claimant.

Order accordingly.

Reported by Sally Kee Seok Meng